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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 772

FRED STEIN AND BERNARD STEIN, PETITIONERS

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 401-410) is reported at 166 F. 2d 851.

JURISDICTION

The judgment of the circuit court of appeals was entered February 27, 1948 (R. 411), and a petition for rehearing was denied March 30, 1948 (R. 412). The petition for a writ of certiorari was filed April 29, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as

amended by the Act of February 13, 1925. See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to justify the verdict.

2. Whether petitioners were entrapped by Margaret Brander with the cooperation of federal agents.

3. Whether any evidence was admitted at the trial which had been obtained through intercepted telephone conversations in violation of the Communications Act of 1934.

4. Whether the arrest of petitioner Bernard Stein and the consequent seizure of the eight cans of opium was illegal.

5. Whether the bottle containing yen shee was illegally seized.

6. Whether the presumption of guilt arising from possession of narcotics (21 U. S. C. 174) is constitutional and was applicable under the facts of this case.

7. Whether evidence of similar offenses was properly admitted.

8. Whether the trial court erred in its instructions to the jury.

STATUTES INVOLVED

Section 2 of the Jones-Miller Act of February 9, 1909, c. 100, 35 Stat. 614, as amended, provides in pertinent part:

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; * * *. (21 U. S. C. 173.)

If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall, upon conviction, be fined not more than \$5000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. (21 U. S. C. 174.)

Section 605 of the Communications Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103, 47 U. S. C. 605, provides in pertinent part:

* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: * * *.

STATEMENT

On October 17, 1945, an indictment was returned in the District Court for the Southern District of California charging the two petitioners and John Fisher with violations of the Jones-Miller Act (21 U. S. C. 174) in that they had received, concealed, and facilitated the transportation and concealment of 56 ounces of prepared smoking opium which they

knew to have been illegally imported (R. 2-3). After a jury trial, all three defendants were found guilty as charged (R. 11). Petitioner Fred Stein was sentenced to seven years' imprisonment and fined \$500 (R. 25-26). Petitioner Bernard Stein was sentenced to three years' imprisonment and fined \$500 (R. 27-28).¹ The judgments were affirmed by the circuit court of appeals (R. 411).

The evidence for the Government may be summarized as follows:

Petitioner Fred Stein and Mrs. Margaret Brander began to live together some time in 1944 and he introduced her to his relatives as his wife (R. 115, 159). In January 1945, after trying in vain to find an apartment, he bought a house on Dixie Canyon Road in Los Angeles; title was taken in the names of Mr. and Mrs. Fred Stein as joint tenants, and they began to live there as Mr. and Mrs. Fred Stein (R. 97-99, 115-116, 224-225).

One day in the summer of 1945, Mrs. Brander walked into the kitchen and saw Fred take some of a black substance from a can, add water, boil it, pour the solution into a bottle and put it in the ice box (R. 116-117, 121). She recognized the can as containing smoking opium because he had previously described such cans to her and told her what they contained (R. 129-132). When she asked what

¹ The files of the Department of Justice show that Fisher was fined \$5000 and sentenced to imprisonment for one year and one day, but execution of the sentence was suspended and he was placed on probation for five years. Fisher did not appeal.

he was doing, he explained that it was opium, and that he had been "on it" for some time and could not quit (R. 122, 132). After an argument, he promised to quit (R. 122-123); however, he continued to prepare the solution, consuming a teaspoonful twice a day (R. 123, 126-128, 135).

On or about September 8, 1945, Mrs. Brander accidentally discovered in the garage at the Dixie Canyon home eight similar cans in a box covered with leaves (R. 136-141). On or about September 11, 1945, she and Fred quarreled over his continuing use of opium and she told him she was through with him and left the house (R. 142-146). Some time later the same day she returned with an elderly friend, Mr. Keys, and found that Fred had taken away almost all her clothing, leaving a note telling her where to call him (R. 150, 153-154, 155). She took the eight cans from the garage and concealed them in three separate locations about the premises (R. 151-153). She then called Fred and asked for her clothes; he told her she would not get them until she returned his "stuff"² (R. 153, 155-156). After that she moved what personal property she could find to the home of Mr. Keys (R. 189). She called Fred again the next day and he told her that he was leaving town, that his brother, petitioner Bernard Stein, had her clothes, and that she could arrange a meeting with Bernard and give him the "stuff"

² There was expert evidence that this term, among others, is used in the traffic to designate smoking opium and other narcotics (R. 355, 357-358; see also R. 142).

(R. 158-159). On September 13, and 14, 1945, there were a number of telephone conversations between Mrs. Brander and Bernard and Fisher, who was a friend of the Steins, as the result of which it was finally arranged, in the early evening of September 14, that as soon as she could get Mr. Keys' car she would meet Bernard and Fisher at the Dixie Canyon house and receive her clothes and show them where the "stuff" was (R. 160-168, 180-184, 186).

At this point Mrs. Brander telephoned Agent Koehn of the Federal Bureau of Narcotics, with whom she had no previous acquaintance (R. 168-169, 201-202, 265).³ Koehn, accompanied by his wife, drove to Keys' house and met Mrs. Brander there between 7:30 and 8:00 p. m. (R. 202, 267, 280, 281). On her own initiative, she then called Fisher to tell him that she would drive over to meet him and Bernard Stein at the Dixie Canyon house. Koehn listened in on this conversation but made no suggestions as to what she should say. (R. 169-170, 202, 205-206, 267-268, 281-282.) After Koehn had telephoned another agent, Davis, to meet them (R.

³ There are indications in the record that petitioners had been under investigation by agents of the Bureau of Narcotics for over a year prior to September 1945 (R. 47-49, 266-267). When Mrs. Brander and Fred Stein began to keep company in 1944 she was living in the home of Mr. Keys, and Koehn had visited Keys in connection with the investigation. Mrs. Brander knew of this, although she had never met Koehn. On the night of September 14, 1945, she obtained the agent's phone number from Keys. (R. 196-202.) Keys, it may be noted, was a retired police officer (R. 268), but there is nothing in the record to substantiate the statement (Pet. 22) that he had been a federal officer.

268-269), Koehn, his wife, and Mrs. Brander started for Dixie Canyon Road in Koehn's car. On the way they stopped and Mrs. Brander made another call to Fisher to ascertain whether he had left. Koehn again listened in but made no suggestions. Fisher told Mrs. Brander that he would start as soon as Bernard Stein was ready, and that she would get her clothes if she told them where the "stuff" was. (R. 171, 187-188, 206-207, 269, 282.) Koehn then picked up Davis, whom Mrs. Brander had never seen or talked to before, and drove to the Dixie Canyon house. There they parked the car on the driveway and, without entering the house, went around to the rear yard, where Mrs. Brander hurriedly pointed out to them the three locations where she had hidden the opium. The agents did not actually see the packages. Agent Davis concealed himself in the rear yard where he could see the three hiding places. Agent Koehn, his wife, and Mrs. Brander returned to the front and waited in the car. (R. 49-50, 63-68, 77-80, 85, 171-172, 207-208, 249-250, 269-271, 284.)

About an hour later, Bernard Stein drove up with Fisher. Mrs. Brander introduced the Koehns as "Mr. and Mrs. Anderson, friends of mine." She then took Bernard to the hiding places in the rear and he picked up the three packages and carried them around the side of the house toward the front. Before he had come out of the shadow, however, he dropped the cans and said that he would not take them out in front of strange people. After some

discussion, Fisher said that he would carry them out himself if Bernard was afraid to do it. Fisher then picked up two of the packages and Bernard picked up the other, and they started to walk toward their car with the packages in their hands. At this point they were arrested by Agent Koehn, who had remained seated in his car, and by Agent Davis, who had in the meantime come around to the front of the house. (R. 50-54, 71-73, 80-88, 173-178, 208-218, 271-276, 283-284.) The cans contained approximately 56 ounces of smoking opium (R. 106).

On September 15, 1945, the day following the arrests, Mrs. Brander returned to the house with two federal agents. She entered,⁴ taking the agents in with her. She made a search about the kitchen and found, in her spice and flavoring cabinet over the stove, a small bottle containing yen shee (the residue from the smoking of opium) in a solution of water. This she turned over to the federal officers. (R. 59-60, 102-103, 193-196.)

ARGUMENT

Petitioners' brief in support of their petition ignores all the more damaging portions of the Government's evidence, particularly Mrs. Brander's testimony that they had demanded that she return the eight cans of opium long before she had any contact with the agents of the Bureau of Narcotics.

⁴ The manner of her entry on this particular occasion does not appear. When she returned for her clothes the day of her quarrel with petitioner Fred Stein she broke a window in order to get in (R. 154, 189, 236-237).

Hence, mere reference to the foregoing summary of the evidence will dispose in large part of petitioners' contentions.

1. Thus, contrary to petitioners' contention that the evidence was insufficient to justify the verdict (Pet. 5, 18, 31-32), there was ample proof from which the jury could have concluded that petitioner Bernard Stein on the night of September 14, 1945, knowingly received 56 ounces of smoking opium, and that in so doing he acted as the agent of his brother, petitioner Fred Stein.

2. Petitioners contend that they were entrapped by Mrs. Brander acting in cooperation with the agents (Pet. 4, 8, 17, 24-28). But the defense of entrapment is sustained only where it is shown that the criminal design is instigated by the officers; artifice and stratagem may be employed to catch those engaged in criminal enterprises. *Sorrells v. United States*, 287 U. S. 435. The evidence clearly shows that the criminal design—the purpose to retrieve the opium from Mrs. Brander—originated with petitioners. There is not the slightest evidence that the criminal intent originated with Mrs. Brander, much less with the agents. The intent to conceal the opium was clearly present in the mind of petitioner Fred Stein long before the events of September 11, 1945, when she secreted it, and he demanded that she return it as soon as he was aware that it was missing (R. 155); and it was at the instigation of Fred that petitioner Bernard Stein

became a party to the transaction (R. 159-162). The federal agents did not enter the picture until Mrs. Brander and Bernard had already agreed to meet for the purpose of exchanging her clothes for the opium (R. 168). The record does not show that even then the agents made any suggestions as to what she should do. They merely accompanied her and observed.⁵

3. Petitioners appear to contend that the two telephone calls from Mrs. Brander to Fisher * which were overheard by Agent Koehn in some manner violated Section 605 of the Communications Act of 1934 (Pet. 4, 17, 21-23). We can perceive no basis for the contention. There is clearly nothing in the cited section which would prohibit the use of the telephone by a decoy, or by a federal agent, in furtherance of an artifice or stratagem where the criminal intent has had its origin in the mind of the criminal. It is true that Section 605 prohibits the use by an unauthorized person of information contained in an intercepted communication. But even if Agent Koehn was an unauthorized person, he did not testify as to what was said in these two conversations (R. 268-269, 368-369)—the fact that

⁵ Petitioners argue that the agents should have seized the opium as soon as Mrs. Brander pointed it out to them, because it then came into constructive possession of the Government, and that the failure to do so constituted entrapment (Pet. 4-5, 18, 28, 29). But, as we have seen, there was evidence that the criminal design had originated with petitioners, and it was perfectly proper for the agents not to intervene before the criminal act reached fruition. *Sorrells v. United States*, 287 U. S. at 441-442.

⁶ The petition incorrectly states that one of these was made to Bernard Stein.

he had listened in was first brought out by Bernard Stein's attorney during cross-examination of Mrs. Brander after she had testified on direct as to what was said (R. 205-207). Nor is there anything in the record to indicate that Koehn made such derivative use of what he heard as to render any substantial portion of the Government's case a "fruit of the poisonous tree." See *Nardone v. United States*, 308 U. S. 338, 341. At the time of the conversations he already knew of the proposed meeting and, so far as appears from the record, he made no suggestions as to what Mrs. Brander should do.

4. Petitioners argue that the arrest of Bernard Stein and Fisher without a warrant and the consequent seizure of the cans of opium was illegal (Pet. 5, 18, 30, 34-35, 38). But the agents needed no warrant on the night of September 14, 1945, for they were on the premises at the invitation of Mrs. Brander, a joint tenant, and they engaged in no search, but merely observed the locations which she pointed out as the hiding places of the opium (R. 50, 68-69, 270). They certainly had reasonable cause⁷ to believe that Bernard Stein and Fisher

⁷ Under California law, § 836, Cal. Penal Code, which determines the validity of the arrests, *United States v. Di Re*, 332 U. S. 581, 589-591, a peace officer may arrest without a warrant:

"1. For a public offense committed or attempted in his presence.

"2. When a person arrested has committed a felony, although not in his presence.

"3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

"4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.

"5. At night, when there is reasonable cause to believe that he has committed a felony."

were committing a felony at the time of the arrest, and it was unnecessary to search them since they were openly carrying the packages. This case is readily distinguishable from *United States v. Di Re*, 332 U. S. 581, in which Di Re was arrested and searched without reasonable cause to believe that he had committed a felony, and from *Johnson v. United States*, 333 U. S. 10, where it was held that officers entered the premises without consent and searched without a warrant, though there was opportunity to obtain one. It may also be noted that petitioners, while objecting to the introduction of this evidence, never made a proper motion to have it suppressed.

5. Petitioners also contend that the bottle containing the yen shee was obtained by means of an illegal search and seizure (Pet. 5-6, 19, 30, 32-34, 35-38, 42-43). On the day after the arrest Mrs. Brander, the joint tenant, took two agents into the house; she made a search, which she certainly had a right to do, and discovered in her kitchen spice cabinet the bottle of yen shee, which she turned over to the agents (R. 193-196). Here again the agents needed no warrant. They were on the premises by consent, and so far as the record shows they did not join in the search. The yen shee was contraband, subject to summary forfeiture. Consequently, it was not the property of petitioner Fred Stein, but of the United States. *United States v. Stowell*, 133 U. S. 1, 16-17; *Henderson's Distilled Spirits*, 14 Wall. 44, 57; *Caldwell v. United States*,

8 How. 366, 379-382. Mrs. Brander had the right to search through her own house and to turn over the contraband, and the agents had the right to receive it. Here again we note that there was no motion to suppress the evidence.

6. Petitioners contend that the presumption of 21 U. S. C. 174, which permits the jury to convict upon evidence of possession of narcotics unless satisfactorily explained, is not applicable under the facts of this case and is, moreover, unconstitutional in that it compels self-incrimination and sets up no proper standard for guidance of the jury (Pet. 5, 6, 18, 19, 38-41). We think it obvious that the presumption is applicable to both petitioners since Bernard Stein was acting as agent for his brother, Fred. In *Yee Hem v. United States*, 268 U. S. 178, this Court held that the presumption did not result in compulsory self-incrimination, and there is nothing to the contrary in *Adamson v. California*, 332 U. S. 46, which involved a peculiar California statute requiring a repeated offender to choose between taking the stand and having his prior offenses revealed or remaining silent and having his silence commented on to the jury. This Court also indicated in the *Yee Hem* case that the standard provided by the statute is sufficient. 268 U. S. at 184; see also *Gonzales v. United States*, 162 F. 2d 870 (C. C. A. 9).

7. Petitioners contend that the evidence as to the yen shee and as to the preparation and consump-

tion of opium by Fred Stein was erroneously admitted because it related to offenses not charged in the indictment (Pet. 6, 19, 42, 43). But this evidence was clearly admissible under the well recognized exception which permits evidence of similar offenses to be introduced to prove intent or guilty knowledge and to rebut a claim of mistake.

8. We submit that the court's instructions to the jury (R. 374-389), when read as a whole, were fair, comprehensive and adequate. In the light of these instructions and of the evidence before the jury, we think it clear that the instructions proposed by petitioners and refused by the court were either erroneous, or misleading, or already satisfactorily covered. We see no necessity for treating in detail the numerous contentions (Pet. 6-7, 20-21, 44-48, 51-54) urged by petitioners in this respect.

CONCLUSION

The decision of the circuit court of appeals is correct, and no conflict of decisions is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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